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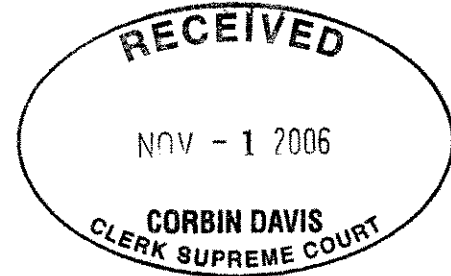
Reply To: Lansing

October 31, 2006

Supreme Court Clerk
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Dear Sir:

Re: ADM File No. 2005-19

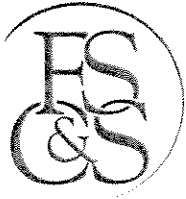


As a matter of introduction, I am the Practice Group Leader of the Commercial Litigation Practice Group of Foster, Swift, Collins & Smith, P.C. I appreciate the opportunity to offer our practice group's preliminary impressions about some of the proposed changes to the rules governing jury trials in Michigan. We offer our comments in the hope that they will be an aid to this Court in its deliberations.

A. EXPERT PROOFS

First, our practice group has concerns about a proposed change to MCR 2.513(G) which would give a trial court the discretion to have expert testimony provided by a panel discussion of plaintiff and defendant experts either moderated by a neutral expert or the trial judge. This rule also would allow the experts to question each other. From a practical standpoint, the mechanics of setting up such a process could be expensive, time-consuming and difficult to carry out. Aside from the procedural hassle that such a process would cause, we question whether trial judges should ever play any role in moderating a discussion where a judge's role is to be a fair and impartial arbiter over the evidence that is received. How does the court's role as a potential moderator fit with the court's role as a gatekeeper of expert evidence? Regardless of whether the court is a moderator, how does the court fairly and impartially rule on objections that would occur as a result of panel discussion or expert questioning? How does the court insure control over the proceeding in this format so that inadmissible testimony is not presented or considered. Curative instructions and good intent may not be enough.

We also question proposed MCR 2.513(G) to the extent it would allow the court to require the consecutive presentation of the parties' expert witnesses. This process might unfairly



force a defendant's hand. Aside from having to reorganize proofs, a defendant may need to present foundation evidence out of order in order for the defense expert to offer an opinion. Aside from confusing a jury as to whose case is being presented, this procedure might allow the plaintiff to counter and consider the introduction of later proofs to refute that foundation. It also might require the defendant to use an expert it might decide later it did not need or want to use as the proofs unfold. As a practical matter, a judge might be tempted to allow expert proofs go to the jury when such proofs may and should require more scrutiny as to their admissibility in order to facilitate a side by side presentation of evidence. Also, we think it is very unlikely that expert witnesses can be herded into a courtroom on the same date or dates.

B. JURY DELIBERATIONS DURING TRIAL

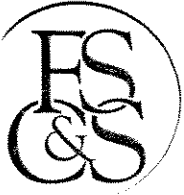
We additionally question proposed MCR 2.513(K) which would allow jurors to have discussions about a case during recesses before the case is closed. This seems impractical in part because some jurors may be excused before the completion of the case. In addition, such discussions may allow jurors to form opinions about the evidence before the evidence is complete, the law is given and the advocates have offered their closing statements. Such discussion also runs contrary to the normal instruction that jurors are to keep an open mind and not discuss the case until they have heard all the evidence, arguments and instructions in the law. Typical voir dire stresses that point. Although it is assumed that jurors may ignore this instruction, we believe that the admonition (however effective) is better than the alternative.

C. INTERIM COMMENTARY DURING TRIAL

We also take issue with proposed rule 2.513(D) which would allow a trial court to give parties the discretion to present interim commentary at various junctures of the trial. In our view, the rule, aside from being vague about what is permissible, would slow trials because of the argument that this procedure will invite and the confusion that it may cause particularly if the theories that are presented to the jury differ from the interim commentary.

D. DEPOSITION SUMMARIES

We disagree with proposed rule 2.513(F) to the extent that it would have the parties prepare written summaries of depositions and provide copies of the summaries to the jury. Although parties are free to work out stipulations and to summarize depositions already, we believe that evidence requires testimony or exhibits. It would seem fairly difficult for jurors to weigh or compare witnesses who testify and others whose deposition testimony is summarized. Also, this procedure may delay the case particularly if an agreement cannot be reached among the parties.



E. JUDGE'S COMMENTS ON EVIDENCE

We take issue with proposed rule 2.513(M) which would allow a trial judge to comment on the evidence. This proposed rule seems intent on changing the court's role as an impartial arbiter. Apparently, the judge would be asked to straddle the line between making a comment on the weight of the evidence and not disclosing any view on the credibility of any witness or disclosing a view on an ultimate fact. Several commentators have astutely predicted that this proposed rule will invite claims of error. This rule seems to suggest that jurors are somehow incapable of playing the role they are asked to play in deciding facts and applying the law to the facts. As a practical matter, jurors will place a great amount of credibility on what trial judges may tell them about a case. This proposed amendment would change the current adversarial process and allow a judge to tilt the balance in favor of one of the adversarial parties.

F. JURY IMPASSES

We also have concerns about proposed rule 2.513(N)(4) because it would allow the trial court to ask about the reason for an impasse in jury deliberations and to respond to that impasse by issuing additional instructions. Again, we believe that judges would be tempted to inject themselves into the process in a way that might invite error or at the very least demonstrate that the judges are not fair or impartial. In addition, at least one critic has suggested that this rule would run contrary to the long established view that jury deliberations should be confidential and immune from meddling.

G. CONCLUSION

In short, we thank the Court for the opportunity to make these comments. In offering these specific comments, we hope that the Court will carefully consider any reform of our jury system, which has worked for the most part very effectively for over 150 years in this state.

Sincerely,

FOSTER, SWIFT, COLLINS & SMITH, P.C.

Webb A. Smith

WAS\CEB\mmh

cc: Gary McRay